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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 POINT RUSTON, LLC, et al.,

11 Plaintiffs,

12 v.

13 PACIFIC NORTHWEST REGIONAL  
14 COUNCIL OF THE UNITED  
15 BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, et al.,

16 Defendants.

CASE NO. C09-5232BHS

ORDER STAYING  
DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT  
AND GRANTING  
PLAINTIFFS' MOTION TO  
SUPPLEMENT THE RECORD

17 This matter comes before the Court on Defendants' motion for summary judgment  
18 (Dkt. 162) and Plaintiffs motion to supplement the record (Dkt. 189). The Court has  
19 considered the pleadings filed in support of and in opposition to the motions and the  
20 remainder of the file and hereby stays Defendants' motion for summary judgment and  
21 grants Plaintiffs' motion to supplement the record for the reasons stated herein.

22 **I. PROCEDURAL HISTORY**

23 On April 21, 2009, Plaintiffs filed their complaint against Defendants. Dkt. 1. On  
24 May 22, 2009, Defendants answered. On May 29, 2009, Defendants amended their  
25 answer. Dkt. 23. On June 17, 2009, this matter was reassigned to the undersigned. Dkt.  
26 32. On January 28, 2010, Defendants filed the instant motion for summary judgment. Dkt.  
27 162. On February 12, 2010, Plaintiffs responded to the instant motion for summary  
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1 judgment. Dkt. 173. On February 19, 2010, Defendants replied. On February 25, 2010,  
2 Plaintiffs filed a surreply to address, they contend, a new issue brought up in the  
3 Defendants' reply brief. Separately, on February 18, 2010, the Court ordered Defendants  
4 to produce additional documents to Plaintiffs. Dkt. 180.

## 5 **II. FACTUAL BACKGROUND**

6 A thorough recitation of the facts can be found at Dkt. 76. As it pertains to the  
7 instant motions, Defendants allege that Plaintiffs, thus far, have failed to produce  
8 "competent damages evidence." Dkt. 162 at 2. Additionally, in Defendants' reply brief on  
9 their motion for summary judgment, Defendants allege that Plaintiffs have, thus far, failed  
10 to establish "competent evidence of causation." Dkt. 181 at 2.

## 11 **III. DISCUSSION**

### 12 **A. Summary Judgment**

13 Defendants move for summary judgment on Plaintiffs' claims for their alleged  
14 failure to produce sufficient evidence on the issues of damages and causation. Dkts. 162,  
15 181. Plaintiffs request that the Court either deny Defendants' motion as premature or  
16 grant a continuance until additional discovery is completed pursuant to Rule 56(f). Dkts.  
17 173, 186. Fed R. Civ. P. 56(f) reads as follows:

18 If a party opposing the motion shows by affidavit that, for specified  
19 reasons, it cannot present facts essential to justify its opposition, the court  
may:

- 20 (1) deny the motion;
- 21 (2) order a continuance to enable affidavits to be obtained,  
depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

22 "[S]ummary judgment in the face of requests for additional discovery is  
23 appropriate only where such discovery would be 'fruitless' with respect to the proof of a  
24 viable claim." *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) (citing *Klinge v.*  
25 *Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988)). Rule 56(f) is "an additional safeguard  
26 against an improvident or premature grant of summary judgment and the rule generally  
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1 has been applied to achieve that objective.” 10B Charles Alan Wright, Arthur R. Miller,  
2 Mary Kay Kane, *Fed. Prac. & Proc.* § 2740 (3d ed. 2004).

3 In opposition to summary judgment and in support of its Rule 56(f) motion,  
4 Plaintiffs contend that more discovery is needed to adequately respond to Defendants’  
5 summary judgment motion. Dkt. 173 at 12. In doing so, Plaintiffs note that their  
6 depositions of Defendants’ representatives will not be completed until April 9, 2010, at  
7 the earliest. Dkt. 174, Declaration of Richard C. Hunt (Hunt Decl.) ¶ 6. Plaintiffs also  
8 note that Depositions of key Plaintiffs’ witnesses, such as Michael Cohen and a 30(b)(6)  
9 witness, still need to be conducted. Plaintiffs contend that these depositions will “be  
10 crucial regarding the cause and amount of plaintiffs’ actual damages.” Further, Plaintiffs  
11 contend, the recent production of documents ordered by the Court (Dkt. 180) will likely  
12 yield more information that will be useful to support Plaintiffs’ claims. *See* Dkt. 190,  
13 Hunt Decl. (including exhibits supporting motion for extension of time to supplement  
14 record, Dkt. 189).

15 The Court is unpersuaded by Plaintiffs’ request for a continuance based on the  
16 depositions of persons who possess knowledge that is reasonably within Plaintiffs’  
17 control, such as Michael Cohen. However, the Court is satisfied that Plaintiffs have  
18 adequately specified why they should be provided more time to obtain additional  
19 discovery of evidence that is allegedly within the Defendants’ control. Further, the Court  
20 recently ordered Defendants to produce additional documents that may prove helpful to  
21 Plaintiffs’ opposition to summary judgment. The Court is unwilling, at this time, to find  
22 that additional discovery would be “fruitless” in aiding Plaintiffs in proving whether they  
23 have a viable claim relevant to the issues of causation and damages. *See, e.g., Jones*, 393  
24 F.3d at 930.

## 25 **B. New Arguments In Reply Brief**

26 When the moving party on summary judgment raises new evidence in a reply as a  
27 basis for granting summary judgment, the district court should give the nonmoving party  
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1 an opportunity to respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).  
2 Plaintiffs assert, and the Court agrees, that Defendants originally based their motion for  
3 summary judgment solely on the issue of damages and not causation. *See* Dkt. 162 at 2  
4 (asserting that Plaintiffs' "failure to produce competent evidence on the essential element  
5 of damages" is fatal to Plaintiffs' claims); *but see* Dkt. 182 at 1 (reply brief on summary  
6 judgment adding issue of causation). On this basis, Plaintiffs contend that they should be  
7 granted leave to supplement the record on the issue of causation. Dkt. 186.

8 In the interest of judicial economy, the Court should consider any theory that  
9 would support the granting of summary judgment rather than leaving an issue for trial that  
10 might have been decided in advance. Accordingly, the Court concludes that Defendants  
11 should be permitted to amend their motion for summary judgment in order to include the  
12 issue of causation and Plaintiffs should be given an opportunity to fully respond.

### 13 C. Conclusion

14 The Court, therefore, stays Defendants' summary judgment motion until April 23,  
15 2010. The Parties may amend their briefing on summary judgment. Defendants' amended  
16 summary judgment motion may be filed on or before April 23, 2010, with responsive  
17 briefing to follow in accord with the rules.

### 18 IV. ORDER

19 Therefore, it is hereby

20 1. **ORDERED** that Defendants' motion for summary judgment (Dkt. 162) is  
21 **STAYED** as discussed herein.

22 2. **ORDERED** that Plaintiffs' motion to supplement the record on the issue of  
23 causation (Dkt. 189) is **GRANTED** as discussed herein.

24 DATED this 4th day of March, 2010.

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27 BENJAMIN H. SETTLE  
28 United States District Judge